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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No.

LEON CHARLES WEISS,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

Petition of Leon Charles Weiss for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and Brief in Support Thereof.

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, LEON CHARLES WEISS, a citizen of the United States, domiciled in the State of Louisiana, respectfully brings this, his application for a writ of certiorari, to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit in this criminal case.

OPINION BELOW

Petitioner was convicted on October 26th, 1940, in the District Court of the United States for the Western District of Louisiana, Monroe Division, of violating the Mail Fraud Statute (section 215, Criminal Code; 18 U.S.C.A., 338). He was found guilty on the first three counts of a nine-count indictment. Sentence was imposed on October 31st, 1940, petitioner being condemned to serve the maximum imprisonment under the statute of five (5) years in the United States Penitentiary, at Atlanta, Georgia, on the first count of the indictment; and on the second and third counts, it was ordered that the imposition of sentence be suspended, and probation granted on the usual terms and conditions. Petitioner thereupon took his appeal to the United States Circuit Court of Appeals for the Fifth Circuit, where judgment was rendered affirming his conviction on June 9th, 1941, Judge Sibley dissenting from the majority opinion by Judge Holmes, with Judge McCord (see opinion and dissenting opinion, Tr. Vol. II, page 1232; 120 F. (2d) 472, advance sheets of July 21st, 1941). Petitioner, within the delays allowed by law, and on June 30th, 1941, filed his petition for a rehearing in the said United States Circuit Court of Appeals for the Fifth Circuit (see Tr. Vol. II, page 1240), which petition for rehearing was denied on September 11th, 1940, with written opinion (see Tr. Vol. II, page 1244; not yet published in reporter advance sheets). On September 12th, 1941, a stay of mandate was ordered by the said United States Circuit Court of Appeals for the Fifth Circuit, for a period of thirty (30) days, exclusive of Sundays and holidays, from September 11th, 1941, to enable petitioner to apply to this Honorable Court for a writ of certiorari to review said final judgment of the United States Circuit Court of Appeals for the Fifth Circuit (Tr. Vol. II, page 1281).

STATUTE INVOLVED

The statute under which defendant was convicted (section 215, Criminal Code; Title 18, U.S.C.A. 338) reads in its pertinent provisions, as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the Post Office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both." (R.S. Sec. 5480; Mar. 2, 1889, c. 393, Sec. 1, 25 Stat. 873; Mar. 4, 1909, c. 321, Sec. 215, 35 Stat. 1130).

JURISDICTION

Jurisdiction of this Honorable Court is invoked under paragraph (a) of Section 240 of the Judicial Code as amended (section 347, Title 28, U.S.C.A.), making it competent for this Court to review by certiorari any case, civil or criminal, in a circuit court of appeals; and the application is made within 30 days after entry of judg-

ment (denial of rehearing), as required by Rule XI of this Honorable Court, promulgated May 7, 1934, and in the manner required by Rule 38 of this Honorable Court.

SUMMARY STATEMENT OF MATTER INVOLVED

The petitioner, Leon Charles Weiss, and one Monte E. Hart, were jointly indicted on nine counts, the first eight for substantive offenses of separate mailings in execution of an alleged scheme to defraud, and the ninth count for conspiracy between Weiss and Hart to commit the same offenses against the United States. The co-defendant, Hart, committed suicide about a month before the case came on for hearing, and Weiss was tried alone.

At the time of the matters referred to in the trial, the petitioner, Leon Charles Weiss, was senior partner in a firm of architects of New Orleans, known as Weiss, Dreyfous & Seiferth. Included in work on public buildings in Louisiana in 1936, and nearby years, which these architects did, was construction at Louisiana Polytechnic Institute at the town of Ruston, State Normal College at Natchitoches, and for Louisiana State University both on the campus at Baton Rouge and in the medical center on the Charity Hospital grounds at New Orleans.

At this time, the defendant Monte E. Hart was a member of the general contracting firm of Caldwell Bros. & Hart, also of New Orleans, which firm was performing much public construction work in Louisiana, including work at the institutions named in the immediately preceding paragraph on which Weiss, Dreyfous & Seiferth were architects.

This indictment grew out of the construction by Caldwell Bros. & Hart between May, 1936, and March, 1937, of a building at Louisiana Polytechnic Institute at Rus-

ton, La., on which Weiss, Dreyfous & Seiferth of New Orleans and Neild, Somdal & Neild of Shreveport were associate architects.

The gist of the joint charge against Hart, since deceased, as a member of the contracting firm, and Weiss, as a member of the associate architects, was that in connection with this building job at Louisiana Polytechnic Institute they devised a scheme to fraudulently obtain $56,914.42, and made or caused certain uses of the United States mails in execution thereof.

The government's theory of this claimed fraud divides it into two elements (to which the defense has objected as actually charging in each count of one indictment, and simultaneously trying the accused for, two separate and dissimilar schemes, if any there existed), and it will suffice to introduce the point by saying here that the $56,914.42 mentioned in the indictment was supposed to have been obtained by Hart and Weiss in two methods: (1) the sum of $27,000.00 was alleged to have been the result of increasing by that amount, in May, 1936, the job price over the actual bid price of Hart's firm, when Weiss, as architect, prepared the contract for signature; and (2) a whole year later in May, 1937, they were alleged to have obtained another amount of $29,056.04, under an architects' final certificate in which Hart presented a claim for value of extra work that the government contended exceeded by that amount the fair value thereof.

In other words, there was an alleged device by which $27,000.00 was added to the cost of the job before it even began, in May, 1936, when the building contract was signed. There is no doubt that this increase took place. The petitioner Weiss, who personally would have stood to gain only a pittance from architects' fees by the price

increase, claimed that he enlarged the price at the then governor's instruction, believing in good faith that the chief executive of the State had reasonable ground for allowing the increase to the contractor as well as authority for doing so, since the governor was obtaining the money for the badly needed school building (to replace a fire loss), in fact, furnishing much of it out of a fund under the governor's discretionary control. As will be seen, this particular alleged fraud, said to have been participated in by petitioner Weiss at one time and one place, presented an issue of whether or not the governor of the State had authorized certain action, and if so, whether Weiss acted reasonably in relying on such authorization.

This propounded an entirely different juror's problem from the other alleged device, at another time and another place, by which Weiss was accused of participating in the obtaining of the other amount of $29,056.04. At the time the contract was signed at the increased price, under the claimed governor's authorization, in May, 1936, the building, of course, had not even begun. There was no regular work yet undertaken, much less any extra work. This so-called extra work by the contractors came chiefly toward the end of the job. It is clear from the testimony that the accused Weiss never visited Ruston, nearly 300 miles from his own office, during the construction period, actual supervision being left to Neild, Somdal & Neild, the associate architects, from nearby Shreveport. The first apparent connection of Weiss with the inflated charge for "extras" was at New Orleans, and not before the end of March, 1937, and possibly as late as about May 17th, 1937, when Hart, according to the testimony of Hart's own bookkeeper, deliberately drew a padded extra bill, included it in his final claim for the job, and delivered it to Weiss as customary basis for the final

architects' certificate on the job. Like the fact of the increase of the contract price in 1936, there is no doubt of the fact of the excessive charge by Hart for the extras in 1937. The defense for Weiss did not attempt, on his trial, to combat the excessive character of Hart's charges for these extras. It was obvious from the testimony of Hart's own bookkeeper that his padding of these figures by Hart had been flagrant and deliberate. The contention of Weiss was only that he had no knowledge of the actual extent of the extras performed on the job, that he believed the bill for these extras had been approved by the architects' superintendent on the job; that, moreover he (Weiss) thought Hart was honest and trusted him, and that his issuance of the final architects' certificate, with inclusion of Hart's excessive charges for extras, had not been as participation by him in any fraudulent scheme, but had, at the worst, been the result of carelessness, caused chiefly by his misplaced confidence in Hart's honesty and partly by pressure of other extensive work he was carrying on at the same time.

It is correct that both of the issues of alleged fraud in the case, first the motive with which Weiss participated in the enlargement of the contract price by $27,000.00 in 1936, and secondly his connection with the padding by $29,056.04 of Hart's bill for extras in 1937, were questions of fact which the jurors ordinarily would have settled by their verdict. Our complaint is, however, that mixed and confused issues of fact were presented to the jurors, under each count; that Weiss was tried, on each count, for one questionable transaction at Baton Rouge in May, 1936, and simultaneously for another questionable transaction at New Orleans in May, 1937, each event being disconnected, proved by different facts and witnesses, and there being absolutely no proof of a continuity of alleged fraudulent conduct on the part of the

accused Weiss from one year to the other which might support an assumption that both transactions were items in one fraudulent plan, as urged by the prosecution and charged by the court.

It is also correct that in a mail fraud case the use of the mails is the gist of the offense. Nevertheless, the use of the mails must be "for the purpose of executing" a fraudulent scheme. Hence the existence of a scheme is the base rock of the case; and, in practical effect, since the evidence of mailing is usually unambiguous, what the jurors are really called upon to decide in such a trial is whether the accused was involved in a fraud.

To place before the same jurors two separate instances of alleged fraud, remote in time and place, unlike in plan or device, depending on independent proof and susceptible of very different inferences on veracity of witnesses, probabilities of error by negligence, etc., is to afford some of the jurors the opportunity to decide for the accused on one accusation of fraudulent practice and against him on the other, and the rest of the jurors vice versa, so that unanimity of decision in the jury box exists on neither horn of the defendant's dilemma, yet his conviction stands accomplished by the mere duplicity of the indictment.

We can understand such a practice being countenanced in cases where the alleged frauds are substantially of the same pattern, so that a conclusion of guilt as to one incident reasonably justifies the same conclusion as to all. Such are the cases of bogus stock sales to many persons, each sale of the same pattern, one merely a repetition of the other, except possibly for the different identity of victim in each instance. In the case at bar the practice was extended beyond the bounds of fair trial, by the submission of two unlike issues of fraud before the same jury.

We address ourselves, in this extremity of the petitioner's case, and in the legal situation we have outlined, particularly to Count 1 of the indictment, the first of the only three counts on which he has been convicted, and the only count on which sentence was actually imposed. What we have already summarized is not only true, we believe, in abstract principle, but under Count 1 it creates a very practical error in the case, arising from the following facts:

Each of the first eight counts of the indictment (the ninth was for conspiracy) charged the mailing jointly by the deceased Hart and the defendant Weiss of a letter in execution of the alleged fraud (the indictment assuming the 1936 enlargement of the contract price and the 1937 padding of the bill for extras to be one single scheme to defraud). The eight letters related generally to the collection of compensation by either the contractors, Caldwell Bros. & Hart, or the architects, Weiss, Dreyfous & Seiferth, and we need now refer only to the letter under Count 1. This was a letter from Weiss, Dreyfous & Seiferth, petitioner's firm at New Orleans, delivered to Louisiana Polytechnic Institute at Ruston, La., on March 3rd, 1937, transmitting to the school (for whom the building was being erected) what was known as architects' Certificate No. 3 for installment of architects' fees on account in the sum of $3,000.00.

This letter of March 3rd, 1937, was alleged in Count 1 of the indictment to have been for the purpose of executing an alleged single scheme to defraud embracing both the contract price enlargement in 1936 and the padded bill for extras in 1937. The trial judge charged the jury (Tr. Vol. II, page 1158) that the scope of the indictment embraced one single scheme to defraud.

Let us consider the sequence of dates to determine

whether, under Count 1, such an allegation of the indictment was duplicity and whether the charge of the court was error. The enlargement of the contract price took place in May, 1936. The mailing complained of in Count 1 was on March 3rd, 1937. The false bill for extras was not even conceived by Hart until about the end of March, 1937 (testimony of his bookkeeper, Seybold, Tr. Vol. II, pages 695-702), and it may not have been called to the attention of Weiss until as late as about May 17th, 1937, the date of issuance by the architects of the final contractors' certificate which embraced Hart's false claim. How could the mailing by Weiss, Dreyfous & Seiferth on March 3rd, 1937, to collect an installment of architects' fees, be allowed to be involved before a jury as being in execution, not only of the alleged pre-existing scheme, but also of a scheme which the government had no proof came into existence, even in the mind of the accomplice Hart, much less Weiss himself, prior to the end of March, 1937?

Glaringly loose pleading resulted in the framing of Count 1 to charge that a letter of March 3rd, 1937, was mailed and delivered in execution of a fraudulent claim not in existence before the end of March, 1937. Having overruled preliminary pleadings attacking this count for duplicity, the trial judge maintained his view despite the evidence (Seybold, government witness, Tr. Vol. II, pages 695-702) that the later scheme to pad the extras was born **after the said letter was mailed,** and instructed the jury that the whole transaction was one scheme to defraud. The Court of Appeals for the Fifth Circuit has supported this view, but its holding seems in direct conflict with the dceision of the Court of Appeals for the Second Circuit in a parallel situation in *U. S. vs. Buckner* (the Philippine bond swindle case), 108 Fed. (2d) 921.

In addition to the duplicity of the indictment, and particularly Count 1 thereof, and the erroneous position taken thereon by the trial judge in his charge, after the evidence had shown the mailing under Count 1 was intermediate in point of time between the two alleged methods of fraud, the defense has complained of the extent to which so-called "system" or "intent" evidence, of collateral matters, was allowed in the Weiss trial. This error by the trial judge was the grounds of the dissent by his Honor, Judge Sibley (dissenting opinion, Tr. Vol. II, page 1238).

As we explained at the opening of this summary statement, in addition to the building at Louisiana Polytechnic Institute at Ruston, La., which was mentioned in the instant indictment, Weiss, Dreyfous & Seiferth had been architects, and Caldwell Bros. & Hart had been contractors, on various other public jobs, at Louisiana State Normal at Natchitoches, La., and for Louisiana State University both on the campus and Baton Rouge and in its medical center on the New Orleans Charity Hospital grounds. The relations between Weiss and Hart in their work at these other institutions were drawn on most liberally by the prosecution, through proof of collateral matters, during the trial relating to the Louisiana Polytechnic Institute building. Conceding the right of the government, where Weiss had pleaded, as he did, innocence of criminal intent in enlarging the contract price on the Louisiana Polytechnic Institute building, and negligence in approving the false bill for extras on same, to off-set his plea by showing his participation in similar happenings elsewhere, we still insist, and one member of the Circuit Court of Appeals has agreed with us, that the District Attorney was permitted to go far beyond the legitimate bounds of such character of evidence, to the great prejudice of Weiss before his jury.

The most conspicuous error of this nature was the admission of a certain $75,000.00 check, belonging to James M. Smith, the deposed and notorious president of Louisiana State University. This check had nothing to do with anything else in the case, and in no manner shed any light on the intent of Weiss, either in what he was alleged to have done at Louisiana Polytechnic Institute or even under the proof of collateral matters at Louisiana State University or elsewhere. This check for such a large amount had no place in the case on trial except to link Weiss up with the discredited Smith in some unexplained money transaction so as to enable the District Attorney to argue to the jurors that Weiss had gotten this $75,000.00 from the head of an institution which was being defrauded, and thus prejudice Weiss heavily before the jury. Not only was this far-fetched evidence admitted, the check for this large amount tendered to and handled by jurors (who were all of moderate means), but the positive argument was made to the jury by the District Attorney **that Weiss had gotten this $75,000.00 from Smith.**

As we will show more in detail in our supporting brief, this check was pulled out of the District Attorney's bag of tricks at the eleventh hour of the trial, 300 miles away from New Orleans where the check had been handled. Neither Weiss nor his counsel had any knowledge of the real disposition by Smith of the money represented by the check, and they had no time or opportunity then for investigation. Weiss was crucified by the District Attorney's argument that Weiss had been the recipient of this large sum of money from the notorious Smith, who at the time of the Weiss trial was serving a penitentiary sentence for his own frauds.

The Weiss trial ended on a Saturday night at Monroe, La. On Monday morning, when the banks and bus-

iness houses of New Orleans opened, we traced the $75,000.00 check. The truth was disclosed. Weiss had never received one penny from Smith. The total amount of the check had been spent by Smith in stock gambling with a prominent national brokerage house. The accusation against Weiss made before the jury by the District Attorney on the previous Saturday had been unjust. The check had been admitted to the jury on a wholly erroneous assumption by the trial judge.

Weiss immediately filed a motion for a new trial, and recited the record evidence of the disposition of the $75,000.00 which had been discovered by his attorneys and was available. This new trial was refused, and the actions of the trial judge with reference to this $75,000.00 check have been approved by the Circuit Court of Appeals, with the dissent noted.

QUESTIONS PRESENTED

The case presents two questions, either of which should warrant the issuance of a writ to review the proceedings below:

1.—The indictment (and particularly Count 1 thereof, on which petitioner has been sentenced to five years in the penitentiary) was duplicitous, in that it charged petitioner, in each count, with participation in two separable alleged frauds; that the mailing charged in Count 1 ante-dated, and could not have been in execution of, the later and subsequent alleged fraud; that in defiance of the government's only evidence as to the time of origin of the later alleged fraud, showing its subsequent conception in the mind of petitioner's alleged accomplice to have been **after** the mailing by petitioner of the letter described in Count 1, the trial judge still charged the jury that there was only one scheme to defraud involved

in the case; and the confused issues of alleged fraudulent conduct before and alleged fraudulent conduct after the time of the mailing in Count 1 were thus left to the jury.

2.—That, under the theory of "system" or "intent" evidence, proof of collateral matters was admitted before the jury which exceeded legitimate bounds of such evidence; particularly in the case of the admission of a certain $75,000.00 check connected with Dr. James M. Smith, former president of Louisiana State University, which should not have been admitted against petitioner at all; but which, as admitted, was allowed on a false predicate of fact, assumed by the trial judge and argued by the district attorney, and immediately after the trial, by newly discovered evidence, was indisputably disclosed to have been false and erroneous; and yet a new trial to remedy this gross injustice to petitioner has been refused.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The reasons relied on for the allowance of a writ of certiorari are:

1.—That the constitutional and statutory rights of the petitioner Weiss have been infringed by conviction and sentence for using, or causing to be used, the mails in execution of a scheme to defraud, where two alleged schemes, separable in time, place, plan, characteristics, details, and proof, were pleaded in the indictment as one single scheme and charged by the trial judge to the jury to have been one single scheme, and the different issues of the two separable and unlike transactions were determined by a jury simultaneously without assurance of unanimity of decision on either alleged fraud; and the inconsistency of holding between the Circuit Court of Appeals for the Fifth Circuit in the instant case and the

Circuit Court of Appeals for the Second Circuit in the *Buckner* case (108 F. (2d) 921) should be resolved.

2.—That the constitutional and statutory rights of the petitioner Weiss have been infringed by conviction and sentence under the conditions and circumstances described in this petition and the supporting brief, where irrelevant and grossly prejudicial proof of other matters not connected with the main case, or even fair "system" or "intent" evidence, has been admitted to the jury, and argued vehemently to the jury, on an assumption which was later revealed to have been wholly false; and yet a new trial has been denied Weiss despite the available record of the obvious falsity of what was allowed to be shown against him before his jury.

TRANSCRIPT ANNEXED

The record having been printed for the use of the court below (Rule 38, paragraph 7), and the necessary copies so printed being furnished, your petitioner has filed herewith the copies of said record as printed below, together with the proceedings and opinion in the Honorable Circuit Court of Appeals for the Fifth Circuit, and due certificate thereon of the Clerk of said Court.

SUPPORTING BRIEF

Petitioner also files herewith and makes part of this application his brief in support thereof.

PRAYER

WHEREFORE, petitioner Leon Charles Weiss respectfully prays that a writ of certiorari may issue to the Honorable the United States Circuit Court of Appeals for the Fifth Circuit, to the end that this cause may be

reviewed and determined by this Court; and that the judgment of the said United States Circuit Court of Appeals for the Fifth Circuit may be in due course reversed and set aside, and that judgment may be rendered in favor of petitioner, setting aside his conviction and sentence pronounced below, and discharging him forthwith; and petitioner prays for all further and necessary orders proper in the premises, and for all such relief as the nature of the case may justify.

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